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No. 92-1012

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY,

Petitioner

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and SIERRA CLUB

On Petition for Writ of Certiorari to the Supreme Court of the State of Vermont

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BRIEF *AMICI CURIAE* OF CENTRAL VERMONT PUBLIC SERVICE CORPORATION, GREEN MOUNTAIN POWER CORPORATION, VERMONT MARBLE POWER DIVISION OF OMYA, INC., CITIZENS UTILITIES COMPANY, VERMONT INDEPENDENT POWER PRODUCERS ASSOCIATION and ASSOCIATED INDUSTRIES OF VERMONT IN SUPPORT OF THE PETITIONER, SIMPSON PAPER (VERMONT) COMPANY

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INTEREST OF *AMICI CURIAE*

Amici curiae represent interests that are affected directly and adversely by the decision of the Vermont Supreme Court in

Georgia-Pacific Corp. v. Department of Envtl. Cons., Vermont Supreme Court, No. 91-530 (Sept. 14, 1992). Central Vermont Public Service Corporation ("CVPS")[1], Green Mountain Power Corporation ("GMP")[2], Vermont Marble Power Division of OMYA, Inc. ("VMPD")[3], Citizens Utilities Company ("CU")[4], and the members of Vermont Independent Power Producers Association ("VIPPA")[5] are owners and operators of hydroelectric generation projects located in Vermont that are subject to the licensing requirements of the Federal Power Act ("FPA"), 16

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[1] CVPS is the largest electric utility in the State of Vermont, serving 132,000 customers, and, through a subsidiary, 10,000 customers in New Hampshire. CVPS' customers include residential consumers as well as industrial and commercial customers who are engaged in interstate and foreign commerce. CVPS operates 20 hydroelectric projects that provide approximately 6% of the supply of electricity needed to meet the requirements of CVPS' customers. Ten of the CVPS projects presently are at various stages of relicensing.

[2] GMP is the second largest utility in Vermont, serving approximately 77,000 residential, industrial and commercial customers in Vermont. Approximately 10% of the energy demand required by GMP's customers is served by eight hydroelectric generation projects located in Vermont. One of those projects presently is engaged in relicensing.

[3] VMPD supplies electricity to municipal, residential and commercial customers located in the Towns of Proctor and Pittsford, Vermont and to its own industrial operations, which are engaged in energy intensive mineral processing in competition with entities from around the United States and from foreign nations. VMPD's electrical load is the fifth largest in the State of Vermont. Of its several hydroelectric projects, VMPD's Center Rutland Project (FERC No. 2445) presently is involved in relicensing. That Project has been operated by VMPD since 1898 and is the smallest of the hydroelectric projects operated by VMPD, which together account for 40% of its electrical requirements.

[4] CU, which is headquartered in Connecticut, supplies electricity to over 18,000 industrial, commercial and residential customers in Vermont. CU owns one hydroelectric project in Vermont that presently is engaged in relicensing.

[5] VIPPA represents the interests of non-utility generators of hydroelectric energy. VIPPA's approximately four dozen members produce, in the aggregate, approximately 50 megawatts of hydroelectric power, or about 5% of the total electric load in Vermont.

U.S.C. § 792 *et seq.* (1985 & Supp. 1992), and to review under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, 1341 (1986 & Supp. 1992).[6] Collectively, CVPS, GMP, VMPD and CU supply electricity to over eighty percent of the population of Vermont[7], including the members of Associated Industries of Vermont ("AIV")[8].

In *Georgia-Pacific*, the Vermont Supreme Court affirmed the Department of Environmental Conservation of the Vermont Agency of Natural Resources ("DEC")[9] imposition of conditions in a water quality certificate unrelated to water quality as part of the licensing

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[6] Applicants for a federal license for an activity that may result in a discharge into the navigable waters of the United States must provide the federal agency with a certification from the state in which the discharge originates that such discharge will comply with applicable provisions of the CWA. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Throughout this brief, such a certification from a state will be called a "§ 401 certification" or a "water quality certificate".

[7] Hydroelectricity supplies 44% of the electric energy consumed in Vermont. Just under 9% of Vermont's electric energy is generated by in-state hydroelectric projects. VERMONT DEP'T OF PUB. SERV., VERMONT COMPREHENSIVE ENERGY PLAN 72 (1991). The cost of energy is of significant concern to economic development in Vermont. VERMONT DEP'T OF ECON. DEV., ANNUAL REPORT 15 (1991).

[8] AIV is a trade association representing over 500 manufacturers and industrial employers located in the State of Vermont that are supplied electricity by the other *amici curiae*. AIV's membership represents 20% of the annual demand for electrical energy consumed in Vermont. Any loss of and any increased cost of producing electricity would be borne to a great extent by the members of AIV. Such an impact would have serious ramifications for AIV's members, not only with regard to the costs encountered by each, but also on their ability to compete interstate and worldwide.

[9] The Agency of Natural Resources, which contains the Department of Environmental Conservation, is the certifying agent for the State of Vermont for purposes of § 401 of the CWA. VT. STAT. ANN. tit. 10, § 1004 (Supp. 1992). Review of state action in issuing a § 401 certification is through the state courts and, ultimately, this Court. *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

of a federally regulated hydroelectric project.[10] If the decision of the Vermont Supreme Court is allowed to stand, similar conditions undoubtedly will be imposed on *amici curiae* who operate hydroelectric projects in Vermont.[11] Such conditions imposed on the projects owned by CVPS, GMP, VMPD and CU and the members of VIPPA will cause adverse economic and environmental consequences.[12] Similar conditions imposed on only those hydroelectric projects of CVPS, GMP, VMPD and CU presently engaged in

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[10] While the conditions approved by the Vermont Supreme Court in *Georgia-Pacific* based on aesthetic and recreational factors may be socially desirable, they are not directly related to "water quality" and they exceed the authority of the States under the CWA.

[11] DEC has indicated to CVPS that it intends to impose, in its projects' water quality certificates, spillage requirements similar to, or in excess of, those imposed upon Simpson for aesthetic, recreation, habitat enhancement and similar non-water quality specific reasons. GMP and CU have received from DEC requests to undertake studies relating to recreation and the aesthetic impact of water spilling over their dams and DEC has indicted that it will seek spill requirements similar to those imposed on Simpson. On November 20, 1992, DEC issued a § 401 certification to VMPD that included the requirement to spill water over the face of the Center Rutland dam at all times during the period April 1 through October 31 in order, *inter alia*, to afford a "meaningful visual attraction" for public viewing and recreational use in the project area. DEC also included requirements to submit a plan for downstream fish passage, in the event future fishery management necessitates such passage, and to provide a canoe portage around the dam together with fishing and other public access. Water Quality Certificate (P.L. 92-500, Section 401) *In re Vermont Marble Company*, Center Rutland Hydroelectric Project, Vt. Dep't of Envtl. Cons., Nov. 20, 1992.

[12] The purchase of replacement power from alternate sources, presently available from fossil-fueled thermal or nuclear generation facilities, would have adverse environmental effects in comparison to hydroelectric projects, including global warming effects, acid deposition from various oxide emissions, thermal discharges, airborne contaminants as well as effects on human health. VERMONT COMPREHENSIVE ENERGY PLAN at 10-18. The Vermont Public Service Board recently determined that, "(with the exceptions of biomass and cogeneration at sites with existing steam loads) hydroelectricity, is the best environmental choice for Vermont." *In re Petition of Twenty-Four Vermont Utilities*, Pub. Serv. Bd. No. 5330, order at 161 (Oct. 12, 1990), *modified* Jan. 7, 1991, *and aff'd*, 3 VT. L. W. 285 (Oct. 2, 1992).

relicensing will cause an annual energy loss of 12,769,000 kilowatt hours, annual cost of replacement power of $1,039,000 and annual emission of 48 tons of oxides of nitrogen, 104 tons of sulphur dioxide and 12,300 tons of oxides of carbon.[13] Those effects do not include the costs and impacts of other non-water quality specific conditions.[14]

Amici curiae, their customers, investors and members are directly and adversely affected by the Vermont Supreme Court's decision in *Georgia-Pacific*. Furthermore, *amici curiae* are representative of the thousands of hydroelectric generation projects, and millions of customers and ratepayers throughout the country who will suffer if state agencies are permitted to usurp the comprehensive authority granted by Congress to the Federal Energy Regulatory Commission ("FERC") under the FPA. While state agencies have been granted authority to administer appropriate water quality requirements under the CWA, Congress has required that FERC, and not the states, undertake the balancing of interests, including recreation and aesthetic values, necessary to the comprehensive development of this Nation's water-power resources. By permitting DEC to regulate recreational and aesthetic values, unrelated to water quality, through conditions imposed in the water quality certificate issued to Petitioner, Simpson Paper (Vermont) Company ("Simpson"), the Vermont Supreme Court has acted

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[13] Calculations based upon Memorandum dated December 3, 1992 from J. S. Duckworth, Chief, Eng'g Section East Branch, FERC, *Fossil Fuel Generation Equivalents and Pollutants* (Dec. 3, 1992).

[14] *Georgia-Pacific* raises additional concerns for VIPPA. The hydroelectric projects operated by VIPPA's members sell electricity on a fixed-price basis over contract terms extending as long as 30 years. Accordingly, the financial viability of those projects would be adversely affected by the loss of revenues resulting from the imposition of conditions in § 401 certifications that require additional spillage of water.

contrary to the express language and intent of the CWA and its decision threatens the uniform, federally managed licensing of hydroelectric projects under the FPA.

Amici curiae respectfully submit the following brief in support of Petitioner. Written consent to the filing of this brief has been granted by counsel for all parties and the originals of such consents accompany this brief.

SUMMARY OF ARGUMENT

The impacts of *Georgia-Pacific* on *amici curiae* compel them to support Simpson's Petition, but it is the conflict between the Vermont Supreme Court's decision and federal law, as expressed in the FPA and the CWA and as interpreted by the courts of other states, that requires review by the Court. The Vermont Supreme Court's decision in *Georgia-Pacific* confers on DEC broad powers to condition or even to deny water quality certificates for hydroelectric projects in furtherance of goals or objectives unrelated to water quality thereby effectively denying the federal license. *Amici curiae* do not contend that non-water quality issues, including recreation and aesthetics, are not within the general ambit of the state's regulatory authority. Non-water quality issues cannot, however, be regulated by states within the context of the FPA and the CWA because Congress has vested in FERC the exclusive authority to license hydroelectric generation projects in connection with a comprehensive, coordinated national program "for the development . . . of power . . . from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . ." FPA § 4(e), 16 U.S.C. § 797(e) (Supp. 1992). Under the CWA, Congress assigned to the states a decision-making role in the licensing process, but that role is limited to the issuance, conditioning or denial of water quality certificates under § 401 of the CWA based

upon water quality standards. Under the FPA, the states may make recommendations on non-water quality issues, but it is FERC that must make the licensing decisions.

The Vermont Supreme Court's decision in *Georgia-Pacific* exceeds the limited authority of the states under the CWA, intrudes upon the authority that Congress reserved to FERC under the FPA and is in conflict with decisions of courts of other states that have determined that actions by state regulatory authorities, essentially similar to those approved in *Georgia-Pacific*, encroach upon and are preempted by the exclusive jurisdiction of FERC.

STATEMENT OF THE CASE

The case is as stated by Petitioner.

ARGUMENT

I. DEC'S IMPOSITION OF CONDITIONS IN SIMPSON'S WATER QUALITY CERTIFICATE UNRELATED TO WATER QUALITY INTRUDES UPON THE JURISDICTION EXPRESSLY AND EXCLUSIVELY RESERVED TO FERC UNDER THE FPA.

A. The States' Role Under The CWA Is Limited To Preservation Of The Integrity Of Water And To Consideration Of The Impact Of Discharges On Water.

Contrary to the decision in *Georgia-Pacific*, it is impermissible for DEC to incorporate into Simpson's water quality certificate conditions unrelated to the chemical, physical and biological integrity of water. The CWA, by its express terms, is concerned with the discharge of pollutants and the restoration and maintenance of "the chemical, physical, and biological integrity of the Nation's

waters." CWA § 101(a), 33 U.S.C. § 1251(a). The states have primary responsibility to prevent "man-made . . . alteration of the chemical, physical, biological, and radiological integrity of water." CWA §§ 101(b), 502(19), 33 U.S.C. §§ 1251(b), 1362(19) (1986). Section 301 of the CWA specifically makes it unlawful for any person to "discharge . . . any pollutant" except in compliance with that and other sections of the Act. CWA § 301, 33 U.S.C. § 1311(a) (1986).[15] Water quality certificates are required only in instances where a federally licensed hydroelectric project may result in a discharge into the navigable waters.[16] CWA § 401(a), 33 U.S.C. § 1341(a).

By the very language of the CWA, the states have primary responsibility for the integrity of water and the impact on water quality of discharges from a federally licensed activity. The CWA

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[15] The CWA defines "discharge of a pollutant" and "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source . . . ." CWA § 502(12), 33 U.S.C. § 1362(12) (1986) (emphasis added). A "point source" means "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14) (Supp. 1992). When used without modifier, a "discharge" includes a "discharge of a pollutant, and a discharge of pollutants." CWA § 502(16), 33 U.S.C. § 1362(16) (1986). The term "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6) (1986).

[16] In *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the court held that five elements must be present for a "discharge" to be found under the CWA: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*." *Id.* at 165 (emphasis in original). An "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175. *See also National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988). "The existence of discharge is critical. . . . On the face of the statute, it is the requirement for statutory coverage." *Save Our Community v. EPA*, 971 F.2d 1155, 1163 (5th Cir. 1992).

affords the states no opportunity to impose conditions in water quality certificates that are unrelated to water quality. In *Georgia-Pacific*, the Vermont Supreme Court relied solely on the clause in § 401(d) of the CWA that permits a water quality certificate to contain effluent limitations necessary to assure compliance with specified limitations or standards "and with any other appropriate requirement of State law set forth in such certification . . . ." CWA § 401(d), 33 U.S.C. § 1341(d). App. 3a.[17] The Vermont Supreme Court undertook no analysis of Congress' inclusion of the word "appropriate" preferring instead an interpretation of § 401(d) that would deem any requirement contained in a state's water quality standards to be appropriate regardless whether it relates to the integrity of water or to a discharge of pollutants.

What is an "other appropriate requirement of State law" under § 401(d) must be determined in the context of the CWA.[18] The requirements to which § 401 of the CWA refers are the state's "technology-based standards and water-quality based standards." *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987). An "other appropriate requirement" must be based upon, limited to and of the same nature as technology-based and water-quality based standards for water. While aesthetics, recreation and scenic beauty not based on water quality may be appropriate values subject to regulation under the general police powers of the states, they are

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[17] References are to the Appendices to the Petition.

[18] A similar phrase, relating to the role of the states under the FPA, has been interpreted by this Court in context to mean "other [requirements] of the same nature." *See California v. FERC*, 495 U.S. 490, 498, *reh'g denied*, 497 U.S. 1040 (1990); *First Iowa Hydro-Elec. Co-op. v. FPC*, 328 U.S. 152, 175-76 (1946); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975) ("The terms that precede 'other project works,' . . . indicate a congressional intent to limit the breadth of that general phrase . . . .")

not "technology-based standards and water-quality based standards"[19] subject to regulation under the CWA or "appropriate" to condition water quality certificates under § 401(d). The inappropriateness of such non-water quality based standards is particularly evident under the FPA where Congress has given to FERC the exclusive jurisdiction and discretion to evaluate and balance against competing public interests the recreational and aesthetic impacts of hydroelectric projects. FPA §§ 4(e), 10(a), 16 U.S.C. §§ 797(e), 803(a) (Supp. 1992). Congress expressly has limited the states' involvement in the recreational and aesthetic impacts of such a project to making "recommendations" of proposed license conditions for FERC's consideration. FPA §§ 10(a)(3), 16 U.S.C. § 803(a)(3).

The power to condition is the power to deny. *Georgia-Pacific* opens the door to the imposition by DEC of non-water quality related conditions sufficiently onerous to constitute a denial of a license by FERC.[20] The court below ignored the intent of the CWA and of the FPA thereby exceeding the bounds of the CWA and intruding upon FERC's exclusive jurisdiction to determine a project's impacts on recreation and aesthetics. The Court should

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[19] The Vermont Supreme Court alludes to the "added deference afforded agency determinations in highly technical fields" in support of its conclusion that recreation and aesthetics constitute an "other appropriate requirement of State law." App. 4a. Conditions imposed in a water quality certificate relating to the aesthetic impressions of people viewing a dam from a bridge and recreational values of canoeing are subjective social values, not "highly technical" issues related to the chemical, physical and biological integrity of water. Vermont's water quality standards do not include any standards for, or definition of, aesthetics, recreation or scenic beauty much less their relationship to the impact of discharges on water. "Such esthetic [sic] judgments are necessarily subjective, defying objective evaluation . . . ." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

[20] Such conditions "shall become . . . condition[s]" of the FERC license. CWA § 401(d), 33 U.S.C. 1341(d).

grant certiorari to resolve the important federal question of the limit of the authority of the states under the CWA and the FPA and to prevent other states from interfering with FERC's exclusive jurisdiction and comprehensive role in the management and utilization of this Nation's water resources.

B. In The FPA, Congress Has Reserved To FERC Exclusive Jurisdiction To Consider And Decide Non-Water Quality Issues And To Balance All Issues Relating To Hydroelectric Projects.

It is appropriate that Congress, in enacting the CWA, reserved to the states the authority to protect the health and safety of their citizens from the discharge of pollutants and recognized the states' authority to adopt and implement water quality standards to achieve those ends. Where Congress has established a process for the uniform and comprehensive development of the Nation's water resources, however, it is equally appropriate that Congress conferred exclusive jurisdiction in FERC to undertake the more subjective process of balancing social issues, such as aesthetics, recreation and other environmental values not based on the chemical, physical and biological integrity of water.

Under the CWA, the states have primary responsibility for the integrity of water and the determination whether discharges of pollutants from a federally licensed activity will comply with applicable water quality requirements. If a state determines that compliance will be achieved, it will issue a § 401 certification, with conditions if appropriate, which then become part of the federal license. CWA § 401(d), 33 U.S.C. § 1341(d). If a § 401 certifi-

cation is denied, the federal license shall not be issued. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1).[21]

Under the FPA, FERC has exclusive authority to issue licenses for the development of power from the waters of the United States in which FERC must give equal consideration to fish and wildlife, recreation and the preservation of environmental quality. FPA § 4(e), 16 U.S.C. § 797(e).[22] Congress has assigned to FERC, and not to the states, the responsibility to include in licenses conditions as in the judgment of FERC will achieve those public interests. FPA § 10(a), 16 U.S.C. § 803(a) (emphasis added).

In *Georgia-Pacific*, the Vermont Supreme Court has delegated to the state precisely what Congress has delegated to FERC. Congress specifically has left to FERC the authority to oversee the regulation and development of water power and to balance such development against recreational, habitat, and other aspects of environmental quality implicated by the development. In *California*, this Court determined that a California law relating to stream flow was preempted by the FPA and held:

> By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while

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[21] Some courts have said that the Clean Water Act gives states a "veto" over the grant of federal licenses for activities potentially affecting a state's water quality. *See, e.g., United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989). If any such veto exists, it exists only with respect to the protection of a state's water quality and must be narrowly construed. *See infra* part II.

[22] FERC must balance the public interest and give consideration to "recreational purposes" under the FPA including the fisheries, wildlife and the importance of each in outdoor living and commerce. *Udall v. FPC*, 387 U.S. 428, 437-44, 450 (1967); *see also Scenic Hudson Cons. Conf. v. FPC*, 354 F.2d 608, 613, 624 (2d Cir. 1965) (FERC must consider the impact of a hydroelectric project on the natural beauty of the site).

> providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role. *See* 16 U.S.C. §§ 803(a)(1)-(3) [16 U.S.C.S. §§ 803(a)(1)-(3)] (FERC to issue license on conditions that protect fish and wildlife, after considering recommendations of state agencies), as amended by the Electric Consumers Protection Act of 1986; 16 U.S.C. §§ 803(j)(1)-(2) [16 U.S.C.S. §§ 803(j)(1)-(2)] . . . .

California, 495 U.S. at 499-500. The Court recognized, as it did in *First Iowa*, that Congress had limited the states' authority under the FPA to avoid establishing "divided authority over any one subject." *California*, 495 U.S. at 502 (quoting *First Iowa*, 328 U.S. at 174). In *Georgia-Pacific*, the Vermont Supreme Court has created divided authority over subjects not based on water quality.

While FERC must consider state concerns and recommendations for the protection of the environment, FERC is not required to adopt those recommendations. FPA § 10(j), 16 U.S.C. § 803(j) (Supp. 1992); *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1482 (D.C. Cir. 1990). By allowing DEC to determine non-water quality based subjects, the Vermont Supreme Court effectively has made FERC's role under FPA 10(j) redundant and meaningless. "There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Assoc. v. Maughan*, No. 91-15934, 1993 WL 17730, *4 (9th. Cir. Feb. 1, 1993). *Amici curiae* recognize

that the states have the power to ensure the integrity of water and that state water quality standards are complied with, but state authority with regard to non-water quality matters is limited to making recommendations to FERC.[23]

The Vermont Supreme Court erred in its determination that DEC had the authority to impose conditions in a water quality certificate that are not based on water quality. The result is a divided authority over non-water quality specific matters contrary to the intent of Congress. Such an intrusion into FERC's jurisdiction raises an important federal question that must be decided by this Court.

C. DEC Is Preempted By The Exclusive Jurisdiction Of FERC Under The FPA From Imposing Conditions In Water Quality Certificate Relating To Non-Water Quality Issues.

By the clear provisions of the FPA, FERC must consider the impact of a proposed development on environmental quality and must balance that impact against the development of water power. The states have an advisory role with regard to such considerations. Under the CWA, however, the states may deal only with the integrity of water and with water quality specific concerns arising from a discharge of pollutants. In *Georgia-Pacific*, the Vermont Supreme Court has affirmed DEC's invasion of FERC's jurisdiction

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[23] The most recent amendment to § 401 of the CWA was in 1977. *See* 33 U.S.C. § 1341. Congress was aware of § 401 certification requirements when it passed the 1986 amendments to the FPA. Had Congress desired the states' authority under § 401 certification to be as broad as the decision below proclaims, Congress would not have added the environmental protection provisions to FERC's authority. The fact that Congress gave that authority to FERC demonstrates Congress' intent not to allow the states to exercise the same authority. *California*, 495 U.S. at 499-500; *see International Paper Co.*, 479 U.S. at 494.

by approving the imposition of conditions in a water quality certificate in excess of the limited role reserved by Congress to the states in the CWA.

Under *Georgia-Pacific*, the states, in the guise of § 401 of the CWA, could "veto" projects on the basis of, or could establish conditions with regard to, fish and wildlife, the protection of recreational opportunities and the preservation of other aspects of environmental quality not based on water quality and without taking into consideration the balancing of interests under the FPA, all of which have been reserved exclusively to FERC. The states then could do indirectly, under the CWA, what they cannot do directly under the FPA. *See International Paper Co.*, 479 U.S. at 495, 497 ("It is unlikely--to say the least--that Congress intended to establish such a chaotic regulatory structure.").

With the exception of the limited authority given to the states in § 401 of the CWA, "the detailed provisions of the [FPA] providing for the federal plan of regulation leave[s] no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. Under *Georgia-Pacific*, DEC is placed in direct conflict with the authority of FERC under the FPA and stands as an obstacle to the balanced review of water power projects that is in the exclusive jurisdiction of FERC. "A state measure is 'pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *California*, 495 U.S. at 506 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)); *International Paper Co.*, 479 U.S. at 494.

The Ninth Circuit Court of Appeals has rejected as contrary to FPA California's efforts to require a hydroelectric project to under-

take studies to assure that the project would comply with state concerns regarding aesthetics, recreation, sport fishing and cultural resources. *Sayles*, 1993 WL 17730. The court held "[t]he state process itself would be an obstacle to the accomplishment of the full purposes and objectives of Congress in authorizing [FERC] to license the project to proceed." *Id.* at *4.[24]

The decision in *Georgia-Pacific* affirms DEC's consideration of non-water quality based aesthetics and recreation thereby upsetting the balance intended by Congress between the FPA and the CWA. Vermont is preempted when it ventures beyond the express provisions of § 401 and imposes an obstacle to the balancing of competing public interests that Congress left exclusively to FERC. The Court should grant the Petition to deal with the important federal question presented by state action inconsistent with the full purposes and objectives of Congress.

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[24] Similarly, an attempt to exert jurisdiction under Vermont's environmental law to evaluate environmental impacts relating to the relocation of a highway and the development of a recreation area in connection with a hydroelectric project raised an important federal question of intrusion upon the exclusive jurisdiction given to FERC. *Town of Springfield v. Vermont Envtl. Bd.*, 521 F.Supp. 243 (D. Vt. 1981). The Vermont Environmental Board was preempted in view of "a clear Congressional intent to bring all aspects of the hydroelectric project within the purview of the federal regulatory scheme." *Id.* at 249. While neither *Sayles* nor *Springfield* involved the issuance of a water quality certificate, the preemptive scope of federal law here is the same as in those two cases. *International Paper Co.*, 479 U.S. at 499 n.20 ("[T]he pre-emptive scope of the CWA necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress.'") (emphasis in original, citations omitted).

II. THE DECISION OF THE VERMONT SUPREME COURT IN *GEORGIA-PACIFIC* IS IN CONFLICT WITH DECISIONS OF THE COURTS OF OTHER STATES WITH RESPECT TO THE IMPORTANT FEDERAL QUESTION OF STATE INSTRUSION IN THE EXCLUSIVE JURISDICTION OF FERC UNDER THE FPA.

Courts of other states, presented with the issue of the scope of the state's authority under § 401 of the CWA with regard to hydroelectric projects subject to licensing under the FPA, have determined that the state's role is narrow and carefully limited. The decision below is in conflict with those of other states. *Summit Hydropower v. Comm'r of Envtl. Protection*, No. CV91050 26 43, 1992 WL 175241 (Conn. Super., July 26, 1992); *Pennsylvania Dep't of Envtl. Resources v. City of Harrisburg*, 578 A.2d 563 (Pa. Commonw. 1990); *Long Lake Energy v. Department of Envtl. Cons.*, 563 N.Y.S.2d 871 (App. Div. 1990); *Fourth Branch Assoc. v. Department of Envtl. Cons.*, 550 N.Y.S.2d 769 (Sup. Ct. 1989); *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274 (Or. App.), *review denied*, 726 P.2d 377 (Or. 1986); *In re Power Auth. v. Williams*, 457 N.E.2d 726 (N.Y. 1983). In *Williams*, the highest court of New York held:

> The certification referred to in the Federal Clean Water Act . . . is simply of compliance with section 303 of the Federal statute . . . . To extend that process, as the order of the Appellate Division would do, to consideration of countervailing energy and environmental interests . . . would be to countenance both a failure by the commissioner to perform the function reserved to him under [the CWA] and an intrusion by him in the area of responsibility pre-empted for the Federal agency.

457 N.E.2d at 730 (citation and footnote omitted).[25] To extend the process, as the Vermont Supreme Court has done, is an intrusion in the area of responsibility preempted for FERC.

Following *Williams*, the New York Supreme Court, Appellate Division, affirmed a lower court ruling that federal preemption precluded the Department of Environmental Conservation of that state from requiring a project subject to § 401 certification to undergo sweeping review of such items as disturbance of stream beds, dam construction, dam safety, reservoir releases and other environmental matters. *Niagara Mohawk Power Corp. v. New York Dep't of Envtl. Cons.*, No. 65306, 1993 WL 2586 (N.Y. App. Div. Jan. 7, 1993). The Appellate Division held "to allow [environmental and conservation factors of concern to a state] to serve as a predicate for a state 'veto' of the project is indefensible for it would effectively undermine the intent of Congress." *Id.*, slip op. at 4 (citations omitted). It is indefensible for the Vermont Supreme Court to undermine the intent of Congress by allowing DEC to condition a water quality certificate on non-water quality bases.

Maine has recognized that, while it may be reasonable to request information relating to matters not limited to compliance with numerical standards for water chemistry, there is a point beyond which a state's action may exceed its jurisdiction. *Bangor Hydro-*

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[25] The *Williams* court relied heavily upon *de Rham v. Diamond*, 295 N.E.2d 763 (N.Y. 1973), which examined the predecessor to § 401, and determined that the FPA "pre-empts all State licensing and permit functions" with respect to hydroelectric projects relinquishing only one element to the states, that being the "narrow question" whether the federal project would violate applicable water quality standards. *de Rham*, 295 N.E.2d at 767-68. The state's narrow, defined role did not include consideration of the safety of a nearby aqueduct, appearance of the shoreline and protection of the river's fish, aside from effect that injury to fish, by the introduction of waste or pollutants, may have on the water quality standards. *Id.*

Electric Co. v. Board of Envtl. Protection, 595 A.2d 438, 440 (Me. 1991).[26] While Maine did not face the question of at what point a state may exceed its jurisdiction, it is that question that is before this Court. The Vermont Supreme Court did not consider just information requests in *Georgia-Pacific*; rather it approved the imposition of conditions in a § 401 certification on the basis of aesthetics and recreation, both of which exceed the jurisdiction of the state and are within the jurisdiction of and preempted for FERC.

The decision by the Vermont Supreme Court in *Georgia-Pacific* clearly and directly conflicts with the determination of the courts of other states on the important federal question of state intrusion in FERC's exclusive jurisdiction under the FPA. This Court will grant certiorari to resolve such conflicts. *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35, 37 (1977). Granting certiorari in the instant case would enable the Court to resolve the existing conflict over the role of the states in § 401 certification and to prevent further uncertainty and confusion as to the extent of that authority.

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[26] In *Bangor Hydro*, the Supreme Judicial Court of Maine stated: "Because the Board has had no opportunity to set any conditions of certification, the question whether it has exceeded its jurisdiction under § 401(d), 33 U.S.C. § 1341(d), is not before us." *Id.* at 443 (emphasis added).

CONCLUSION

For the reasons stated above, *amici curiae* support and respectfully request that the Petition for Certiorari be granted because of the important federal questions raised.

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Respectfully submitted,

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